



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 141 OF 2015

KAJIWE RUWA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal Case Number 2339 of 2013 in the Chief Magistrate's court at Mombasa–Hon. J. KAMAU (RM))

JUDGMENT

1. The appellant herein **KAJIWE RUWA**, was initially charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The prosecution however later successfully applied to substitute the main charge with the charge of attempted defilement contrary to Section 9(2) of the Sexual Offences Act. The appellant pleaded not guilty to the main count and its alternative charge and a trial thereafter ensued in which the prosecution tendered the evidence of a total of 5 witnesses.
2. The particulars of the charge were that on 25th September 2013 at [Particulars Withheld] area within Mombasa County unlawfully and intentionally attempted to defile DM (particulars withheld) a boy aged 11 years. The particulars of the alternative charge of the indecent act with a child were that on the same date, he intentionally touched the anus of DM (particulars withheld) a boy aged 11 years with his penis.
3. The prosecutions case, as narrated by the main witness DM (PW1), the complainant, was that on 25th September 2013, the complainant was watching video at the shop of one David when the appellant invited him to his (appellant's) house where he placed PW1 on a mattress and defiled him. PW1 reported to PW2 and PW3. PW4 Dr. Lawrence Ngone examined the complainant on 26th September 2013 and filled the P3 form while PW5 was the investigating officer. PW5 took the complainant for age assessment and his age was established to be 11 years.
4. When placed on his defence, the appellant tendered a sworn statement in which he denied committing the offence or any knowledge of the complainant and attributed his woes to PW3 whom he alleged that he had differences with over a debt of kshs 1,000/-. On cross examination, he stated that the charges were a fabrication by PW3 who used PW1 to fix him.
5. At the close of the trial, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him on the main count of attempted defilement after which he was sentenced to 12 years imprisonment thereby precipitating the filing of the present appeal in which the appellant has set out what he terms "mitigation grounds of appeal" wherein he states that he is a first offender, a layman and the sole breadwinner for his young family. The appellant further states that he is remorseful and will not repeat the same mistake again.
6. At the hearing of the appeal, the appellant maintained his line of mitigation and urged the court to order for his release from prison as he had reformed his ways.
7. On his part, Mr. Isaboke learned counsel or the state submitted that both the conviction and sentence were well founded in law and urged the court to reject the appeal.
8. As the first Appellate Court, the duty of this court is to re-analyse and re-evaluate the evidence adduced before the trial court afresh and to arrive at my own independent findings while bearing in mind the fact that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not

the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

9. 24. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

10. Upon considering the record of appeal and the rival submissions made on the appeal, I find that the main issue for determination is whether the prosecution proved the charge of attempted defilement against the appellant beyond reasonable doubt.

11. In determining whether there was sufficient proof of the offence I find that it is necessary to revisit the complainant's testimony on his encounter with the appellant on the material day and juxtapose the said testimony with the evidence of PW4, the doctor who examined the complainant barely one day after the alleged attempted defilement incident.

12. The complainant testified, in part as follows:

"He placed me on the bed. He told me to face upwards. I was wearing a trouser and shirt. He then put off the light. I did not see what happened. I went in the morning and told my aunt. He removed my trousers. He did not tell me why he removed my trouser. He did not remove his. It was dark I do not know if his trousers.

It has a mattress on bed. He fell on me. I felt pain in my head, arms and legs. He had removed his trouser. He lay on my back. I felt pain. He used his thing got urinating on my back. I felt pain in my head and back. I was sleeping on my stomach. He told me to wear my clothes after he finished. I told the police that he fell on me and he removed my clothes and put his urinating thing (penis) in my buttocks."

13. PW4, on the other hand, testified as follows:-

"I have DM's P3. He is a boy of 11 years as of year 2013. He complained of defilement in his anus on 26th September 2013. He was brought on 26th September 2013 to Coast General Hospital for examination. After examination, no injuries were found on his body or on anus. No clinical evidence indicated that he was defiled on that date. I signed P3 on 25th October 2013. I wish to produce it – P3 form marked Exhibit 1. I also have the Post Rape Care Form. It also verifies what I said earlier. There was no evidence he was defiled."

14. The trial magistrate made the following finding in this judgment that is the subject of his appeal.

15. My own analysis of the evidence presented by the prosecution is that the complainant's claim that he was sexually assaulted by the appellant who he alleged inserted his penis into his anus, was not supported by the medical evidence of PW4. I have also perused the P3 form which was filled by the PW4 and produced as an exhibit during the trial. I note that even though the complainant complained of that he felt pain on his head, and back and that the appellant inserted his penis in his anus, the P3 form shows that he had no physical injuries on any part of his body and that there was no evidence of defilement.

16. It is noteworthy that the complainant was examined by PW4 only a few hours after the alleged sexual assault and my take is that if indeed the complainant was defiled as he had claimed, then the doctor who examined him only a few hours later could have at least noted a single sign of such defilement. Moreover, the evidence of PW1 clearly pointed to the offence of defilement and not attempted defilement as the prosecution wanted the trial court to believe.

17. PW2 testified as follows:

"The child looked very sick. He was in pain and curled himself. He was also crying. He said someone hurt him. He said someone had defiled him from the back. He mentioned he name Kajiwe. The accused is my very close neighbour."

18. My take therefore is that the evidence of PW1 and PW2 did not only not support the offence of attempted defilement, but was also not corroborated by the medical evidence which was categorical that there was no evidence of defilement.

19. This court is aware of the provision under Section 124 of the Evidence Act which stipulates that:

" provided that where in a criminal case involving sexual offence the only evidence is that of the alleged victim of the offence, he court shall receive the evidence of the alleged victim and proceed to convict....the court is satisfied the alleged victim is telling the truth."

20. In the present case, however, the complainant's evidence was not the only evidence of the offence as there was also the medical evidence, tendered by PW4 which tended to counter the complainant's claim that he was defiled. In the circumstances of this case, one can only that there was a contradiction between the evidence of PW1 and PW4 which then makes me entertain the doubt that the appellant may not have been involved in the alleged crime. Needless to say, the burden is always on the prosecution to prove its case beyond reasonable doubt which burden is even more pronounced in sexual offence cases where there is a severe minimum mandatory sentence.

21. In conclusion, I find that in the circumstances of this case, the appeal is merited and it would be unsafe to uphold the conviction on the offence of attempted defilement.

22. Consequently, I quash the appellant's conviction, set aside the sentence and order that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at Nairobi this 4th day of March 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8th day of April 2019.

NJOKI MWANGI

JUDGE

In the presence of:

Appellant present

Ms Marindah for the Director of Public Prosecution

Mr Oliver Musundi – Court Assistant